IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 5TH SEPTEMBER 2007 / 14TH BHADRA 1929

SA.No. 542 of 1994(F)

(AGAINST JUDGMENT AND DECREE DTD. 25/03/1993 IN AS.57/1988 OF THE ADDL.DISTRICT COURT, MAVELIKKARA CONFIRMING THE JUDGMENT AND DECREE DTD. 28/09/1987 IN OS.168/1984 OF THE MUNSIFF'S COURT,HARIPAD)

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APPELLANT: APPELLANT:PLAINTIFF:

P.K.CHERIAN,
PALAYATHIL CHIRAMEL,
VEEYAPURAM MURI, VEEYAPURAM VILLAGE,
KARTHIKAPPALLY TALUK.

BY ADV. DR.P.S.KRISHNA PILLAI

RESPONDENTS:RESPONDENTS:DEFENDANTS & LRS OF D1 & D2:

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1. KORUTH ABRAHAM,
PALAYATHIL PEEDIKAYIL,
VEEYAPURAM MURI, VEEYAPURAM VILLAGE,
KARTHIKAPPALLY TALUK. (D I E D).

2. KORUTH OMMEN,
...DO....DO..... (D I E D).

***3. YOHANNAN GEEVARGHESE,**
PUTHENPARAMBIL, MANNAMTHOTTU VAZHI,
PADINJATTUM MURI, KADARA VILLAGE,
THIRUVALLA (DIED ON 30/06/91)

4. GEEVARGHESEJOHN,....DO....DO.....

***IT IS RECORDED AT THE RISK OF THE APPELLANT THAT R3 IS DEAD AND NOBODY NEED BE IMPLEADED AS LRS OF R3 AS PER ORDER DTD. 7/10/98 ON MEMO CF NO.3608/98 DTD. 7/09/98.**

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**** 5. CHACKO MATHAI,**
CHIRAYIL HOUSE, VEEYAPURAM MURI,
VEEYAPURAM VILLAGE,
KARTHIKAPPALLY TALUK. (EXPIRED ON 8./11/2000)

6. PENNAMMA OMMEN,
PALAYATHIL HOUE, VEEYAPURAM MURI,
VEEYAPURAM VILLAGE, KARTHIKAPALLY TALUK.

7. RAJU OMMEN,
..DO...DO....

8. ACHANKUNJU OMMEN,
....DO..DO....

9. SUSAMMA OMMEN,
....DO....DO....

10. THANKAMMA ABRAHAM,
PALAYATHIL PEEDIKAYIL,
VEEYAPURAM MURI, VEEYAPURAM VILLAGE,
KARTHIKAPPALLY TALUK.

11. THANKACHAN, ...DO...DO..

12. THAMPAN, ...DO...DO....

13. KUNJUMON, ...DO...DO.....

****ADDL.R14 TO R19 ARE IMPLEADED:**

R14. ANNAMMA MATHAI, W/O.CHACKO MATHAI,
AGED ABOUT 70, CHIRAYIL HOUSE,
VEEYAPURAM MURI, VEEYAPURAM VILLAGE,
KARTHIKAPPALLY TALUK, ALAPPUZHA DISTRICT.

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R15. KUNJUMON, S/O.CHACKO MATHAI,
AGED ABOUT 46, RESIDING IN PALAYATHIL COLONY,
VEEYAPURAM MURI, VEEYAPURAM VILLAGE,
KARTHIKAPPALLY TALUK, ALAPPUZHA DISTRICT.

R16. AMMINI, D/O.ANNAMMA, AGED ABOUT 45,
RESIDING AT CHIRAYIL HOUSE, ...DO..DO....

R17. GEORGEKUTTY, S/O.CHACKO MATHAI,
AGED AHOUT 42, ...DO....DO.....

R18. DEENAMMA, D/O.ANNAMMA, AGED ABOUT 37, ..DO..DO...

R19. KUNJUKUNJUKUTTY, S/O.CHACKO MATHAI,
AGED ABOUT 35, ...DO...DO.....

**ADDITIONAL RESPONDENTS 14 TO 19 ARE IMPLEADED AS THE LR'S OF THE DECEASED5TH RESPONDENT VIDE ORDER DTD. 13/06/05 IN C.M.P.NO.293/01 IN S.A.542/1994.

BY ADV. SRI.M.R.RAJENDRAN NAIR)for R5 & R12
SMT.P.V.ASHA)

SRI.WILSON JOHN)
SRI.THOMAS GEORGE) for R6

SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL) for R9

SRI.M.R.SUDHEENDRAN)
SRI.M.R.HARIRAJ)
SMT.REKHA VASUDEVAN)
SRI.SURAJ.S)
SMT.VINEETHA B.) for R14 & R19

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 05/09/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR,J.

S.A .NO.542 OF 1994

Dated 5th September 2007

J U D G M E N T

Plaintiff in O.S.168 of 1984 on the file of Munsiff court, Haripad is the appellant. Defendants 1 to 4 are respondents 1 to 40. On the death of first respondent, respondents 6 to 9, his legal heirs and on the death of second respondent, respondents 10 to 13 his legal heirs were impleaded before the first appellate court. During the pendency of the appeal third respondent died. As his shares were purchased by 5th respondent, his legal heirs were not impleaded. On the death of 5th respondent, respondents 14 to 19 were impleaded as legal heirs. Appellant instituted the suit seeking a decree for fixation of boundary and for injunction. Plaint schedule properties along with the remaining properties originally belonged to Edichandy Koruthu and his wife Eleyamma. Under Ext.A1 partition deed properties were divided. Executant No.4 is the appellant. First respondent was executant No.1. Second respondent was executant No.3 and

executant No.2 was Koruthu Varghese, father third respondent. Under Ext.A1 properties allotted to appellant as item No.4, comprises two items in survey No.2609.A/1 having an extent of 12¼ cents and 2½ cents in survey No.2611. Said properties are plaint schedule properties. Appellant instituted suit contending that because of close relationship no fence was fixed separating properties allotted to the sharers under Ext.A1 and subsequently respondents joined together and attempted to reduce portion of the properties of the appellant to their possession and they have no right to do so and even though appellant tried to get the property measured and boundaries fixed it was objected to on the ground that resurvey proceedings are pending. Appellant also contended that in resurvey proceedings portions of the properties of appellant are being included in the property of his brothers and he filed appeal before resurvey Assistant Director and it is pending. Appellant therefore sought a decree for fixation of boundaries of his property and also a perpetual injunction restraining respondents from trespassing into the property. Defendants filed separate written statement contending that appellant did

not obtain possession of the property allotted to him under Ext.A1 and they are in possession of the property and there is no necessity to fix the boundaries and therefore suit is to be dismissed. Fifth respondent in his written statement contended that he is a kudikidappukaran and as per order of Land Tribunal he is in possession of 8 cents and appellant has no right over the said property and therefore suit is to be dismissed.

2. Learned Munsiff appointed PW3 as Commissioner. He submitted Exts.C1(a) report and C1(b) plan. Appellant filed objection contending that Commissioner has not measured the property in accordance with Ext.A1 partition deed and therefore they are to be set aside. Trial court remitted the report back to Commissioner. Commissioner submitted Ex.C2 report and C2 (a) plan. Learned Munsiff on the evidence of Pws.1 to 3, DW1, Exts.A1 and A2, B1 to B9 and C1 to C2(a), dismissed the suit holding that appellant is not entitled to the decree, as he failed to establish his possession of property and report of Commissioner shows that property is in the possession of others. Appellant challenged decree and judgment before Additional District court,

Mavelikara in A.S.57 of 1988. Learned Additional District Judge on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed appeal. It is challenged in second appeal.

3. Second appeal was admitted formulating following substantial questions of law.

> 1) In the light of the contentions put forward by the parties and in the light of the materials on record, are the courts below justified in proceeding to decide upon the issues involved in the case without calling for a plan in respect of the plaint items prepared on the basis of the description of properties in Ext.A1 partition deed with the help of the original plan?
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> 2) On the facts and circumstances of the case and in the light of the observations made by the courts below, are they justified in rejecting the plaint claim without granting liberty to plaintiff to file a fresh suit for declaring his title and possession over the plaint items as also for recovery of possession?

4. Learned counsel appearing for appellant and

respondents were heard.

5. Argument of learned counsel appearing for appellant is that as suit is for fixation of boundary, without proper identification of the property suit should not have been decided by courts below. It was argued that though Ext.C1(a) report and Ext.C1(b) plan were remitted back to Commissioner, Commissioner did not identify property with reference to Ext.A1 partition deed and instead followed earlier plan prepared on the basis of resurvey plan and in such circumstances, courts below should not have dismissed the suit. Learned counsel also argued that in any case liberty is to be granted to appellant to get the property identified and seek a declaration of his title and recovery of possession. It was argued that possession of defendants during the pendency of suit cannot operate as adverse possession. Learned counsel appearing for respondents pointed out that report of Commissioner establish that portion of property claimed by appellant is not in the possession of appellant and still plaint was not got amended and courts below found that as appellant is not in possession of the property he is not entitled to get fixation of boundary and the appeal is only to be

dismissed.

5. True, when suit is filed for fixation of boundary, suit is to be decided only after proper identification of the properties with reference to title deeds. The grievance of the appellant was that Commissioner did not identify the property with reference to Ext.A1 partition deed and old plan and instead identified the property with reference to the possession and that too on the basis of resurvey plan which was objected to by plaintiffs. Ordinarily, when such suit was decided by courts below without proper identification property it should have been interfered. But in the nature of facts and circumstances of this case, I do not find that it is necessary.

6. When a suit is filed for fixation of boundary, if portion of the plaint schedule property is found to be in the possession of others, no decree for fixation of boundary could be granted without seeking a decree for recovery of possession of that portion of property. By putting up boundary on fixation, a plaintiff cannot recover possession of the property from the possession of the defendants, without seeking a decree for recovery of possession. Suit was framed only

for fixation of boundary and for injunction. In such circumstances, substantial question of law as formulated are not involved. In the facts and circumstances of the case especially when the property was not identified with reference to Ext.A1 partition deed and old plan, interest of justice warrants that appellant is to be granted liberty to file fresh suit for seeking a declaration of title as well as for fixation of boundary and for recovery of possession of the property. It is made clear that recovery of possession could only be subject to the plea of adverse possession available to respondents.

7. In the result, second appeal is dismissed. Appellant is at liberty to file fresh suit for declaring his title and recovery of possession and fixation of boundary. It is made clear that question of adverse possession is left open to be decided in that suit.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.542 OF 1994

5th September 2007

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